SUPREME COURT, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1022

LARRY G. CARTER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Sixth Circuit

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Petitioner asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the case of United States of America vs. Larry G. Carter, No. 73-1360, on December 4, 1973.

OPINIONS BELOW

The opinion of the District Court, Eastern District of Michigan, Southern Division, is unreported. It is printed herein at Appendix A. The opinion of the United States Court of Appeals for the Sixth Circuit, is unreported. It is printed herein at Appendix B.

JURISDICTION

A decision of the Court of Appeals was entered November 6, 1973, affirming Petitioner's conviction. An Order denying rehearing was entered December 4, 1973 (Appendix E). Petitioner was granted bail pending decision on this Petition by the District Court. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I

Is not a conviction for possession of six grams of cocaine violative of Amendment V of the United States Constitution: where the cocaine is found in a small coin sized envelope in the middle of a dining room table in an apartment occupied by four persons at the time of arrest, and in an apartment in which several different people were present on the night preceding an arrest, and in an apartment to which at least one adult person besides the occupant had a key?

II

Is not an entry into a dwelling violative of Amendment IV of the United States Constitution when made by federal agents, ostensibly for the purpose of serving a subpoena, by using a rear door instead of a front door provided with a doorbell and a buzzer system, and by falsely declaring themselves to be from a banking service, and who gain entry to an inner apartment by threat and intimidation of the occupants?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Amendments IV and V of the United States Constitution, set forth herein at Appendices C and D respectively.

STATEMENT OF CASE

(Figures in parenthesis preceded by RA refer to transcript of District Court proceedings of December 5, 1972; those preceded by RB refer to District Court proceedings of December 14, 1972; those preceded by RC refer to District Court proceedings of March 2, 1973; unless clearly indicated otherwise.)

Larry Carter was charged by Information (RA 9) with possession of narcotics (six grams of a powdery substance containing 7.4% cocaine hydrochloride) in violation of 21 U.S.C. Section 844(a) (RA 35, 42). In a trial by the District Court sitting without a jury, he was found guilty on December 14, 1972 (RA 10, 16-17, RB 271-277, RC 2). A sentence of one year plus a fine of $2500.00 was imposed on March 2, 1973 (RC 7). Mr. Carter's conviction was affirmed by the United States Court of Appeals for the Sixth Circuit on November 6, 1973 (Appendix B). A rehearing in the Court of Appeals was denied on December 4, 1973 (Appendix E).

The evidentiary record upon which the constitutional deprivations involved in this Petition are asserted, is as follows:

On July 18, 1971, a Sunday, two agents of the Federal Bureau of Narcotics and Dangerous Drugs

had in their possession a witness subpoena to be served on Larry Carter (RA 11, 29-30, RB 8-9, 75-76). The subpoena was issued from the C.D. Pest Control, and it required Mr. Carter's appearance before a grand jury sitting in Milwaukee, Wisconsin (RA 11, 30 RB 8, 76).

The agents, James Stepp (RA 10, RB 8) and Harold Davidson (RA 20, 75) knew Mr. Carter because of surveillances they had made of him at times not apparently involved with their mission of July 18, 1971 concerning the Wisconsin subpoena (RB 51, 91). Claiming they were unable to locate him in order to serve the subpoena, the agents went to 11549 14th Street, Detroit, Michigan on July 18, 1971, shortly after noon in search of Mr. Carter (RA 11-12, RB 36-38, 60, 63).

The building to which Stepp and Davidson went on 14th Street is a multi-unit apartment (RB 38). There is a front door to the building which enters to a lobby (RB 38-40). Usually entry to the building is obtained by ringing a doorbell in the front (RB 38). A buzzer system connected to the front door allows persons within the building to let in those seeking entry (RB 39).

However, Stepp and Davidson made no effort to enter the building through the front entrance (RB 39). Instead, without asking permission from anyone (RB 43-44), they entered the building through a rear door (RB 9, 42-43, 76-77). After letting themselves in through the rear door, the agents ascended a stairway which led to a back door of apartment number 4 on the second floor (RA 12, RB 9, 41-45, 76,

90, 95). The back door was secured inside the apartment by a chain latch lock (RA 12, RB 77).

When the agents got to the door, they knocked and announced themselves to be from a "banking service" (RA 12, RB 9, 46, 76, 175). Robert Daniels went to the door when he heard the agents' knock and false representation (RB 170-173, 175). He called Larry Carter to the door (RB 175). When Carter got to the door, he opened it partially (RB 219-224). The agents then announced themselves to be federal officers, shoved "credentials" at Mr. Carter, and gave every indication they intended to enter the apartment by force if necessary (RA 12, RB 10, 46, 77, 176-177, 223, 226). Mr. Carter opened the door, letting in the agents (RA 12, RB 10, 47, 50-51, 77, 176, 211, 276).

The agents entered to a dining area of the apartment (RB 10, 54, 78). Once inside, Stepp told Mr. Carter about the Wisconsin subpoena, gave it to him, and he sat down at a dining table supposedly to fill out the return of service on the subpoena (RA 13, 21, 30, RB 10, 53-54, 57, 78, 223, 228). When Stepp was seated at the table, Mr. Carter sat to his right, and Davidson stood behind Mr. Carter (RA 13-14, RB 10, 54, 79, 101, 228).

As Stepp was sitting he saw a small, coin-type manila envelope resting in the tray of a lazy susan in the middle of the table (RA 13, 24, 31, RB 11, 58, 79). Although the envelope was folded over and closed, Stepp claims that he saw a white powdery substance within the envelope (RB 181, 195-196, 215, RA 13, 26, RB 11, 57-58). Davidson could not see what was inside the envelope (RB 79). Stepp, with-

out asking permission from anyone, and without knowing to whom the envelope belonged, reached over, picked it up, and after emptying its contents, proceeded to administer a field test to determine whether it contained heroin or cocaine (RA 14, 26, 31, 33, RB 11, 13, 58-59, 80, 181, 192, 194, 215). When Stepp concluded the powdery substance contained cocaine, he immediately placed Mr. Carter under arrest for possession of it (RA 15, RB 14, 60, 80).

Testimony that Mr. Carter made incriminating statements after being arrested was contradicted, and it was not taken into consideration by the District Court when he made his finding of guilt (RB 15, 33, 72, 81, 85, 109, 215, 273, 276).

The apartment on 14th Street was lived in by Joane McLenore (RB 173, 183, 221) a girlfriend of Mr. Carter (RB 221). A gathering for several couples was held in the apartment on the night before the Sunday arrest involved herein (RB 184, 201, 214). Beer cans, ash trays, and record covers were still strewn around the dining table and in other parts of the apartment from the gathering (RA 14, RB 184, 201). At the time the agents entered the apartment it was occupied by Robert Daniels, Ms. McLenore's 19 year old brother, a Ms. Lake, a four year old child, and Mr. Carter, who was wearing only shorts on that mid-summer day (RB 183, 229, 243). Mr. Daniels was one of those who had a key to the apartment (RB 205).

Mr. Carter lived at a different address (RB 219-220). The electricity on 14th Street was in his name,

and he used that address on his driver's license (R 119, 222, 239). He has used different mailing a dresses from time to time (RB 208). He denied ha ing the envelope or even knowing it was on the tab (RB 215).

REASONS FOR GRANTING THE WRIT

A

1. The historical and constitutional mandate th criminal convictions must be founded upon proof guilt beyond a reasonable doubt, *Re Winship*, 3 U.S. 358 (1970) is avoided by the decisions of t District Court and Court of Appeals below. Eve judge and lawyer knows and understands that t reasonable doubt concept is vague and illusive wit out meaningful standards employed to aid its appl cation. The Court in *Holland v. United States*, 3 U.S. 121, 140 (1954), recognized the necessity f furnishing some measurable yardstick to assist t fact-finder give life to the reasonable doubt expre sion. The fact-finder must be impressed with the nece sity of reaching a subjective state of 'certitude on t facts in issue.' *Re Winship, supra*, 397 U.S. 358, 36 *Winship* teaches, too, that in order to find "guil beyond a reasonable doubt, due process requires "pro beyond a reasonable doubt of every fact necessa to constitute the crime . . ." 397 U.S. 358, 364.

2. *Guevara v. United States*, 242 F.2d 745 (5th C 1957); *Delgado v. United States*, 327 F.2d 641 (9 Cir. 1964); and *People v. Davenport*, 39 Mich. Ap 252, 197 N.W.2d 521 (1972), provide a meaningf

standard to aid the trier of fact in its application of the reasonable doubt requirement. The contrary and conflicting rule of the Sixth Circuit obfuscates, rather than aids, the fact-finder's duty. Guilt by speculation and conjecture results. However robust a suspicion of guilt there may be in any criminal prosecution, such a suspicion should not be permitted to convict. Yet, the refusal of the Sixth Circuit to apply a standard in circumstantial cases which is invoked by other Circuits, enhances findings of guilt upon mere suspicion.

3. Larry G. Carter was convicted because a small quantity of cocoaine (RA 35, 42) was found in an apartment lived in by his girlfriend (RB 173, 183, 221); and, he was convicted because he used the address of the apartment on his driver's license (RB 119, 222, 239), and the electricity in the apartment was listed in his name (RB 119). In fact, Mr. Carter resided at a different address (RB 219-220); and, in fact, the apartment in which the cocaine was found had been visited only hours earlier by several people coming in and out (RB 184, 201, 214), some of whom were in the apartment at the time the cocaine was found in the middle of a table within a small coin envelope (RB 183, 229, 243, RA 13, 24, 31, RB 10, 53-54, 57, 78, 223, 228).

Convictions resting on more compelling evidence were set aside in *Thompson v. United States*, 293 A.2d 275 (D.C. Ct.App. 1972); *Delgado v. United States*, 327 F.2d 641 (9th Cir. 1964); *Guevara v. United States*, 242 F.2d 745 (5th Cir. 1957); and *United States v. Holland*, 445 F.2d 701 (D.C. Cir.

1971). It is a perversion of the reasonable doubt concept and it is an infringement upon due process to rest a finding of criminal possession on no evidence of such possession. See *Thompson v. Louisville,* 362 U.S. 199 (1960).

4. Respondent tries to save its evidentiary deficiency by asserting alleged incriminating statements made by Mr. Carter after his arrest. It is not necessary here to argue the inadmissibility of such statements, see *Wong Sun v. United States,* 371 U.S. 471, (1963), and discussion below. The District Court rejected proof of such statements as having no bearing upon his finding of guilt. He, thus, termed contradictory evidence of the statements as a "standoff." (RB 273). A "stand-off" in proofs hardly rises to the certitude required for proof beyond a reasonable doubt. *Re Winship, supra.*

B

1. Entry by federal narcotic agents here was, according to their claim, for the purpose of serving a foreign district grand jury subpoena (RA 11, 30, RB 8, 76). The right of the agents to enter the building is no greater than those attendant upon officers making an arrest without a warrant, *Miller v. United States,* 357 U.S. 301 (1958). See also, *The Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970).*

2. Although the agents could have rung the front doorbell and awaited a response by buzzer (RB 38-

*An officer serving process has no right to break into a dwelling for purposes of service. See, *Foley v. Martin,* 142 C. 256, 71 Pac. 165 (1904).

39), they opened a back door and entered the building using a back stairway (RB 9, 42-43, 76-77). They entered without permission of anyone (RB 43-44), and they entered even without compliance with 18 U.S.C. Section 3109. *Sabbath v. United States,* 391 U.S. 585 (1968).

3. The stairway entered which is common to the tenants in the building is just as much protected from unreasonable entry as the inner apartment in which Mr. Carter was present. *McDonald v. United States,* 335 U.S. 451 (1948). As Mr. Justice Jackson said in *McDonald,* "Having forced an entry without either a search warrant or arrest warrant to justify it, the felonious character of their entry . . . followed every step of their journey inside the house and tainted its fruits with illegality." See also, *State v. DiBartolo,* 276 So.2d 291 (La. S.Ct., 1973).

4. The illegal entry is not saved by any consent given for the officers to enter the inner apartment. The door to the inner apartment was unlatched only after the officers falsely claimed to be from a banking service (RA 12, RB 9, 46, 76, 175), and only after the officers indicated their intention to enter the inner apartment with or without permission, and with force if necessary (RA 12, RB 10, 46, 77, 176-177, 223, 226).

Such tactics do not sustain the government's obligation to prove that consent to enter was given freely and voluntarily. *Bumper v. North Carolina,* 391 U.S. 543 (1968); *Amos v. United States,* 255 U.S. 313 (1921).

5. Once having illegally entered the building and having coerced their way into the inner apartment, one narcotic agent seeks to sustain the seizure complained of as being made in "plain view." (RB 181, 195-196, 215, RA 13, 26, RB 11, 57-58). Agents may not justify a warrantless seizure by pushing themselves within a position to claim "plain view" of the evidence they want. *Coolidge v. New Hampshire*, 403 U.S. 443, 470 N.26 (1971).

Moreover, the claim of "plain view" simply is not credible. The Court must be mindful that the subpoena to be served was possessed by narcotic agents rather than by United States Marshals as would be the case in usual services of subpoenas. See, *e.g.* F.R.Cr.P. 4(c), 17(d). The bad faith of the agents is convincingly demonstrated by their rear door entry without using the front doorbell and buzzer system. They did not have to enter the inner apartment, but they could have given the subpoena to Mr. Carter at the door inasmuch as he was known to them (RB 51, 91). Once inside the apartment only one of the two agents claims to have seen in "plain view" the small coin-type manila envelope which contained the powdery substance (RB 79). The envelope was closed and folded over (RB 181, 195-196, 215, RA 13, 26, RB 11, 57-58). The ruse and stealth condemned in *Coolidge v. New Hampshire, supra,* permeates the record below.

Courts have and they should reject testimony of federal agents which is inherently incredible. *Jackson v. United States*, 353 F.2d 862 (D.C. Cir. 1965). "Power is a heady thing—and history shows that the police acting on their own cannot be trusted." *Mc-*

Donald v. United States, supra, per Mr. Justice Jackson at p. 456. Recently, the Ninth Circuit had occasion to review testimony of narcotic agents and found it to be inherently incredible. *United States v. Marshall,* .....F.2d..... (9th Cir. 1973), 14 CRL 2030. The testimony of agent Stepp similarly is too lacking in credibility to support the government's claim of a plain view search.

6. The Court of Appeals recognized in its opinion below the "substantial issue concerning the validity of the seizure of the cocaine." But, the Court refused even upon rehearing to decide the issue. The search involved was presented and argued in the District Court (RA 4-5, 15, RB 253-254, 272). Mr. Carter's conviction rests upon the search's poisonous results and solely upon those results.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, or, in the alternative, the cause should be remanded to the Sixth Circuit Court of Appeals for the purpose of deciding the validity of the search.

Dated this 28th day of December 1973 at Detroit, Michigan.

Respectfully submitted,

PAUL ROSEN,

CORNELIUS PITTS,

Attorneys for Petitioner.

(Appendices Follow)

Appendix A

The Court: Title 21, section 844(a) states: it shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly pursuant to a valid prescription or order from a practitioner while acting in the course of his professional practice or except as otherwise authorized by this sub-chapter or sub-chapter two of this chapter.

The information here which was returned on August 30th, 1971, charges that on or about the 18th day of July, 1971, in the Eastern District of Michigan, one Larry Carter, defendant herein, unlawfully and knowingly did possess approximately six grams of cocaine, a schedule two controlled substance, in violation of Title 21, section 844(a), United States Code.

The court will deny the defendant's motion for a directed verdict in this matter.

The court does not have any problem with the matter of the illegal entry that is alleged by the defense. The agents did have a subpoena that was to be served and it was actually served on the defendant Larry G. Carter. Mr. Carter admits that it was served on him. And not only was it served on him, but he was told of the urgency of the subpoena and that he had to be in another state within a couple or three days, I have forgotten the exact time, but the officers did actually serve the subpoena, at least one officer did, or one of the agents.

As to the two chemists, the Government witness, Mr. Roger Fuelster, and the witness that the defense brought, Dr. Stephen Shrader, the court has real concern in this area about the actual contents of this; but based upon the experience and expertise of the Government chemist, the court is convinced that there was the six grams of cocaine that the chemist said was in the substance that was mailed from Detroit and that was found in the apartment where the defendant was on that particular day.

There has been no evidence and the record is devoid of any evidence to the effect that this white envelope was placed there by the agents. The real problem comes in terms of whether or not the defendant Larry Carter knew or should have known or had possession, either actual or constructive, that this manila envelope was there and its contents.

The court is going to discount the alleged statements made by Mr. Carter, that this was his dope and it was for his own personal use. I think there is a stand-off in terms of the proofs there as to whether or not he made these statements.

The plain view doctrine certainly is invoked here, that the envelope was there. Mr. Daniels said that he saw the officer going into the envelope. There is a question as to whether or not, as Agent Stepp said, he saw the white substance from where he was sitting as he sat down to fill out the subpoena.

Now as to this address of 11549 Fourteenth, the court has to use his own experience, his own common

sense, and view it in the light of his personal experience. The defendant's drivers license had as his address 11549 Fourteenth Street. The utility bills were in the name of Larry Carter, I believe, and Mr. Carter admitted that when the officers got to the apartment, that he had been there sleeping and that he was in his shorts.

The real problem that the court is having is as to possession. Now, we know that the law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who although not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Now, there has been testimony that there was a party at this address the night before. This could be true or it could not be true. The court has no way of knowing. But the court does know this and is satisfied, that the defendant had all of the indicia of living in that particular apartment. The court therefore finds that the defendant actually and knowingly had control over the manila envelope that was found and possessed in the apartment; and that he not knowingly unlawfully had control of this substance. The court feels that the Government has sustained its burden beyond a reasonable doubt and therefore finds the defendant Larry Carter guilty as charged and will

continue the defendant on bond and refer this matter to the Probation Department for presentence report.

Mr. Pitts: May it please the court, one other factor I didn't bring out during the course of the argument, I just assumed, and perhaps for the salvation of the record for the purpose of appeal, I must point out that I interpret my motion for a directed verdict also, at least I intended it to be, that a motion for suppression of the evidence should be based upon these arguments, mainly, illegal entry and the question of the circumstances under which the evidence allegedly was seized.

The Court: Well, the record will reflect that, Mr. Pitts.

Mr. Pitts: There was just one other factor, your honor, I don't want to be overbearing to the court, but if the court so found that Mr. Carter had the indicia of ownership, it would seem to me that there was also, because of the fact that somebody else was living there, reflected in the record that the indicia of ownership was there too. It would seem to me that the cases I addressed my attention to, with reference to the People v.—strike that—Delegato v. U.S. and Gary v. U.S., dealing with multiple occupancy of an apartment, would be applicable here and that the Government has the burden of dispelling the reasonable inferences that could be interpreted from that joint occupation and possession. And wherein the court might have found Mr. Carter did have the indicia of control, he was not in exclusive control and possession and I submit it would be necessary in view

of the fact that a girlfriend lived there, as the evidence would reflect.

The Court: Well, I think, Mr. Pitts, this would be an interesting question. You are an excellent lawyer and you have been very successful before this court in the cases you have tried before it, and on appeal I think that you have a very strong point there. But the court, based on the record as it stands now, the fact of the utility bill, he was sleeping there in his shorts, his driver's license showed this address, and then, as I say, there was a standoff about his statement that the officers or that the agent said he made, that this was his; and to take that in its totality, I think the Government has proven beyond a reasonable doubt the charge here.

As the court said, I will continue the bond and refer this matter to the Probation Department for presentence report.

Court will stand adjourned.

(Adjournment.)

Appendix B

United States Court of Appeals
for the Sixth Circuit

No. 73-1360

United States of America,
Plaintiff-Appellee,
vs.
Larry G. Carter,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed November 6, 1973.

Before: PECK, and McCREE, Circuit Judges, and ALLEN*, District Judge.

PER CURIAM. This is an appeal from a judgment of conviction of knowingly and unlawfully possessing a quantity of cocaine, a controlled substance, in violation of 21 U.S.C. § 844(a), entered by the court sitting without a jury.

The sole issue presented on appeal is whether there was sufficient evidence to permit the trial judge to

*The Honorable Charles M. Allen, United States District Judge for the Western District of Kentucky, sitting by designation.

find beyond a reasonable doubt that the offense had been established. This issue was preserved for our consideration by a timely motion for acquittal.

The evidence viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60 (1942), establishes that the controlled substance was found by federal agents in a bowl in plain view in the apartment in which appellant resided.

The district court expressly posited his finding of guilt on the inference he drew that appellant constructively possessed the cocaine because he occupied and controlled the apartment where it was found. Appellant, on the other hand, contends that the cocaine could just as likely have been the property of one of the three or four other persons present in the apartment when the controlled substance was discovered or that it could have been left there by someone in attendance at a party held on the premises the previous Saturday. Appellant urges us to adopt the rule that in circumstantial evidence cases, the evidence must exclude every reasonable hypothesis except that of guilt before the trier of fact may consider the question of guilt or innocence.

Although there is precedent in other circuits and in some state jurisdictions supporting this proposition, *see e.g., Guevara v. United States*, 242 F.2d 745 (5th Cir. 1957); *Delgado v. United States*, 327 F.2d 641 (9th Cir. 1964); *People v. Davenport*, 39 Mich. App. 252, 197 N.W.2d 521 (1972), it is not the law of this circuit. *United States v. Conti*, 339 F.2d 10 (1964); *United States v. Prieur*, 429 F.2d 1237 (1970).

In *Conti,* we followed the teaching of the Supreme Court in *Holland v. United States,* 348 U.S. 121 (1954) where it said:

> The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions, (Citations omitted), but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. (Citations omitted).
>
> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

We are not persuaded to reconsider the rule of this circuit at this time.

The record suggests that there may be a substantial issue concerning the validity of the seizure of the cocaine, but this issue was not presented in this appeal and we expressly do not decide it here.

Accordingly, the judgment is affirmed.

Appendix C

UNITED STATES CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Appendix D

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix E

No. 73-1360

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee

vs.

Larry G. Carter,
Defendant-Appellant

ORDER

Before: Peck and McCree, Circuit Judges, and Allen,* District Judge.

Upon consideration the Petition for Rehearing is hereby denied.

Entered by order of Court.

/s/ James A. Higgins, Clerk

December 4, 1973

*The Honorable Charles M. Allen, United States District Judge for the Western District of Kentucky, sitting by designation.